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In the Supreme Court of the United States

October Term, 1984

LOUISIANA PUBLIC SERVICE COMMISSION,

Appellant

versus

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Appellees

On Appeal from the United States Court of Appeals for the Fourth Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May the Federal Communications Commission order the state regulatory agencies to raise intrastate rates to further a federal policy of strengthening the financial health of telephone companies, although the Communications Act specifically reserves jurisdiction over intrastate rates to the States?*

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* The Virginia State Corporation Commission was the petitioner in the proceeding before the court of appeals. The Federal Communications Commission and United States of America were respondents. The Louisiana Public Service Commission was an intervenor. The following parties were also intervenors: North American Telephone Association; American Telephone and Telegraph Company; Florida Public Service Commission; State of Michigan and Michigan Public Service Commission; Department of Public Utility Control of the State of Connecticut; People of the State of California and the Public Utilities Commission of the State of California; National Association of Regulatory Utility Commissioners; Southern Pacific Communications Company; Public Service Commission of the District of Columbia; Public Utilities Commission of Ohio; Arkansas Public Service Commission; Kansas State Corporation Commission; GTE Service Corporation; Public Service Commission of Wyoming; Continental Telecom Inc.; Washington Utilities and Transportation Commission; United Telephone System, Inc.; Department of Public Service of the State of Minnesota; Arizona Corporation Commission; Cincinnati Bell Inc.; Citizens of the State of Florida; National Association of State Utility Consumer Advocates; Consumer Advocate of South Carolina; Office of Consumers' Counsel for the State of Ohio; Iowa State Commerce Commission; Public Service Commission of Wisconsin; Public Service Commission of West Virginia; New York State Department of Public Service; The Bell Telephone Company of Pennsylvania; The Chesapeake and Potomac Telephone Company; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Chesapeake and Potomac Telephone Company of West Virginia; The Diamond State Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Mountain States Telephone and Telegraph Company; New England Telephone and Telegraph Company; New Jersey Bell Telephone Company; New York Telephone Company; Northwestern Bell Telephone Company; The Ohio Bell Telephone Company; Pacific Northwest Bell Telephone Company; The Pacific Telephone and Telegraph Company; Bell Telephone Company of

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals, which is reproduced in the appendix commencing at page A-1, is reported as *Virginia State Corporation Commission v. Federal Communications Commission*, 737 F.2d 388 (4th Cir. 1984). This opinion affirmed a ruling of the Federal Communications Commission, which is reported as *Amend. of Part 31*, 92 F.C.C.2d 864 (1983) and is reprinted in the Appendix beginning at page A-24. The ruling overruled a previous decision of the Commission, reported as *Amend. of Part 31*, 89 F.C.C.2d 1094 (1982), and reprinted in the Appendix commencing at page A-61.

JURISDICTIONAL GROUNDS

1. The ruling of the court of appeals upholds a decision of the Federal Communications Commission ("FCC") that requires state regulatory agencies to increase intrastate rates. In *Amend. of Part 31,* 92 F.C.C.2d 864 (1983) ("*Preemption Decision*"), the FCC declared void state policies and rates that conflict with a prior order issued in C.C. Docket No. 79-105, 85 F.C.C.2d 818 (1981), requiring the expensing by carriers of station connections, and an order issued in Docket 20188, 83 F.C.C.2d 267 (1980), giving carriers the option of adopting depreciation practices allowing faster capital recovery. The *Preemption Decision* invalidates accounting and depreciation practices of the Louisiana Commission and at least three of its ratemaking orders. *Ex parte South Central Bell Telephone Co.,* Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-94; *Ex parte South Central Bell Telephone Co.,* Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-97; General Order, *In re reaffirmation of the applicability of state regulatory principles* (La. Pub. Serv. Comm'n, 1981), App. at A-104. In another ratemaking order, the Louisiana Commission was compelled to allow $62.7 million in intrastate rates to South Central Bell Telephone Co. to avoid noncompliance with the *Preemption Decision* and disobedience of a federal court injunction. *Ex parte South Central Bell Telephone Co.,* Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984), App. at A-112.

The Virginia State Corporation Commission sought review of the *Preemption Decision* in the United States Court of Appeals for the Fourth Circuit pursuant to 47 U.S.C. §402(a) and 28 U.S.C. §2342. The *Preemption Decision* was affirmed by the Fourth Circuit.

In a related proceeding, South Central Bell Telephone Co., a communications common carrier subject to the intrastate jurisdiction of the Louisiana Commission, brought an "enforcement" proceeding pursuant to 47 U.S.C. §401(b) to compel the Louisiana Commission to "obey" the *Preemption Decision*. The United States District Court for the Middle District of Louisiana issued an injunction requiring the Louisiana Commission to adopt the accounting methods prescribed by the FCC. It also mandated an increase in intrastate rates. *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983). The court held that it could not review the validity of the *Preemption Decision*. *Id.* at 223. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984). The Louisiana Commission has appealed the Fifth Circuit decision. The Fifth Circuit decision enforced the *Preemption Decision* and precludes the Louisiana Commission from adhering to the aforementioned ratemaking orders.

2. The decision of the United States Court of Appeals for the Fourth Circuit was rendered June 18, 1984. Timely petitions for rehearing were filed by the petitioner in the court of appeals, the Virginia State Corporation Commission, and three intervenors. The petitions for rehearing were denied on October 3, 1984. App. at A-90. A notice of appeal was filed by the Louisiana Commission in the United States Court of Appeals for the Fourth Circuit on November 27, 1984. App. at A-92.

3. The Court has jurisdiction over the decision of the court of appeals pursuant to 28 U.S.C. §1254(2), which permits appeals to this court when state laws are invalidated as repugnant to the United States Constitution. The

decision of the court of appeals affirmed a ruling that invalidates state ratemaking orders. Ratemaking orders of a legislative nature are state "statute[s]" for the purpose of 28 U.S.C. §1254(2). *E.g., Atchinson T. & S.F. Ry Co. v. Public Utilities Commission of California*, 346 U.S. 346, 348 (1953); *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois*, 249 U.S. 422, 424 (1919). Article 4, Section 21 of the Louisiana Constitution invests the Louisiana Commission with general regulatory authority over common carriers and public utilities. The ratemaking function of the Louisiana Commission is legislative. *E.g., Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 364 So.2d 1266, 1268 (La. 1978); *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 352 So.2d 964, 969 (La. 1977).

4. The Court is also granted certiorari jurisdiction over this case pursuant to 28 U.S.C. §2350(a), which provides that a final judgment of a court of appeals in a proceeding to review a decision of the FCC is "subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this chapter." Although the review proceeding is the exclusive means of reviewing an agency decision in a court of appeals, 28 U.S.C. §2350(a) does not state that it provides the only means of reviewing a court of appeals decision in an agency review proceeding. Indeed, the language of the statute suggests that it is not mandatory. We have located no decisions indicating that 28 U.S.C. §2350(a) provides the exclusive means of reviewing a court of appeals decision affirming an FCC order when the order also invalidates a state statute. The agency review statute does not suggest any intent to curtail the appellate jurisdiction of this Court. The statute granting this Court appellate jurisdiction over court of appeals decisions invalidating state laws, 28 U.S.C. §1254(2), makes no

exception for agency review proceedings. Congress intended that this Court have appellate jurisdiction to ensure that state laws are not deemed unconstitutional without review by the highest court in the federal judicial system. Therefore, the Court has jurisdiction over this appeal.

Should the Court determine that the appeal is improvidently taken, we request the Court to treat the appeal papers as a petition for certiorari pursuant to 28 U.S.C. §2103.

STATUTORY PROVISIONS

The following federal statutes, set forth in the Appendix commencing at Page A-131, are involved in this case:

47 U.S.C. §151
47 U.S.C. §152
47 U.S.C. §153(e)
47 U.S.C. §220
47 U.S.C. §221(b)
47 U.S.C. §221(c)
47 U.S.C. §410

The following state ratemaking orders, set forth in the Appendix commencing at page A-94, are involved in this case:

Ex parte South Central Bell Telephone Co., Order No. U-15445 (La. Pub. Serv. Comm'n, 1983).

Ex parte South Central Bell Telephone Co., Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983).

General Order, *In re affirmation of the applicability of state ratemaking principles* (La. Pub. Serv. Comm'n, 1981).

Ex parte South Central Bell Telephone Co., Order No. U-15955-A (La. Pub. Serv. Comm'n, 1984).

STATEMENT OF THE CASE

1. Preliminary statement.

This case presents the issue of whether the Federal Communications Commission ("FCC") may require state regulatory commissions to raise intrastate rates, despite express statutory provisions reserving jurisdiction over these rates to the states. The FCC preempted state ratemaking practices that were inconsistent with two of its own accounting orders[1] and mandated the adoption of the federal procedures in setting intrastate rates.[2] It thus conscripted state regulatory officials to increase intrastate rates to further an FCC policy.

The *Preemption Decision* overturned a prior decision of the FCC, issued eight months earlier, in which the FCC determined that preemption of state ratemaking methods is neither required by the Communications Act nor necessary to accomplish a federal policy.[3] In its earlier decision, the FCC stated that state commissions had always been free to set intrastate rates based on their own

[1] *Amend. of Part 31*, 83 F.C.C.2d 267 (1980); *Amend. of Part 31*, 85 F.C.C.2d 818 (1981).

[2] Memorandum Opinion and Order (hereinafter cited as "*Preemption Decision*"), 92 F.C.C.2d 864 (1983).

[3] *Amend. of Part 31*, 89 F.C.C.2d 1094 (1982).

accounting practices.[4] A decision to preempt state ratemaking practices, it said, would "repudiate nearly forty years of administrative practice and applicable state court precedents...."[5]

The court of appeals affirmed the *Preemption Decision*, in which the FCC reversed its earlier ruling, by a 2-1 majority. The decision in principle supports the abrogation of all state ratemaking power by the FCC and the forced enlistment of state ratemaking officials to implement FCC mandates. The court of appeals did not determine whether the Communications Act preempts state ratemaking practices, but held that the FCC could take "affirmative regulatory action"[6] to preempt in furthering a federal policy. This principle supports the preemption of any state ratemaking determination to force an increase in intrastate rates, and thus eviscerates the provisions of the Communications Act reserving jurisdiction over intrastate rates to the states.[7]

2. Regulatory background.

Pursuant to the Communications Act, the FCC and the state regulatory agencies for five decades have divided the responsibility for regulating telephone carriers. Much of the plant devoted to communications service is used jointly to provide both interstate and intrastate service. A portion of the investment in this plant, and the associated

[4] *Id.* at 1106.

[5] *Id.* at 1107.

[6] *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388, 392 (4th Cir. 1984), App. at A-1, A-8.

[7] 47 U.S.C. §§152(b), 153(e), 221(b), App. at A-132, A-132, A-136.

expenses, have been assigned in a separations process to the interstate jurisdiction; the remaining investment and expenses remain in the intrastate jurisdictions. The assignment is made only for jointly used plant; plant that is used solely for intrastate service is accounted for wholly in the intrastate jurisdictions. Interstate toll revenues and interstate "access" charges are fixed by the FCC to cover expenses and provide the companies a return on capital for interstate operations, while local tariffs cover intrastate expenses and provide a return to intrastate investment.

In *Smith v. Illinois Bell Telephone Co.*,[8] which predated the Communications Act, this Court mandated the separation of the intrastate and interstate plant and expenses of a telephone company in testing the fairness of an intrastate rate order.[9] The "separation" process requires quantifying the portion of the rate base and expenses to be assigned to each jurisdiction for setting rates. The Court ruled that the separation was "essential to the appropriate recognition of the competent governmental authority in each field of regulation,"[10] and "[t]he proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction...."[11] The Court required a reasonable apportionment of the property of the company, based on the "actual uses to which [it] is put."[12]

In the Communications Act, Congress recognized

[8] 282 U.S. 133 (1930).

[9] *Id.* at 148-51.

[10] *Id.* at 148.

[11] *Id.* at 149.

[12] *Id.* at 151.

the need to separate the property of carriers for regulatory purposes and gave the FCC the power to create joint federal-state boards to make this classification.[13] The decision of this Court in *Illinois Bell*, requiring the separation of property based on use, has provided the basis for developing separation factors.[14] Currently about 75 percent of the telephone plant is allocated to the intrastate jurisdictions, and about 25 percent to the interstate jurisdiction.[15]

The Communications Act also contemplates that the FCC prescribe a uniform system of accounts to be used by carriers in reporting their affairs. These accounts have not been viewed as binding for ratemaking. State agencies often rely on the uniform system of accounts, but frequently have required carriers to maintain separate records for intrastate ratemaking or reporting.

Section 220 of the Communications Act grants authority to the FCC to prescribe the forms of accounts to be maintained by carriers and to prescribe regulations governing depreciation for carriers.[16] Pursuant to this authorization, the FCC promulgated a uniform system of accounts in 1935.[17] This uniform system was designed to promote, as much as possible, uniformity in the reporting

[13] 47 U.S.C. §221(c), App. at A-137; 47 U.S.C. §410(c), App. at A-138.

[14] *See* NARUC-FCC Separations Manual; Amend. of Part 67, 96 F.C.C.2d 781, 788 (1984).

[15] *See* Amend. of Part 67, 96 F.C.C.2d 781, 785 n.11 (1983).

[16] 47 U.S.C. §220(a), (b), App. at A-133.

[17] *See* Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 HARV. L. REV. 433, 438 (1944).

of the financial affairs of regulated carriers, and many state regulatory agencies adopted the system or substantially similar systems.[18]

The uniform system of accounts has never been considered conclusive for ratemaking. When the uniform system was attacked by the American Telephone & Telegraph Co. ("AT&T") after its promulgation, the FCC assured this Court that special provisions would be made to correct for accounting inequities after consideration of all circumstances.[19] The District of Columbia Court of Appeals later interpreted these assurances as establishing that the FCC system "merely was a system of notation, without substantive significance,"[20] although the accounts inevitably have a powerful influence on ratemaking. The FCC and the Federal Power Commission each have departed from their uniform systems for ratemaking purposes.[21] As the Fifth Circuit once stated in reviewing a decision of the Federal Power Commission: "[A]ccounting for tax purposes and even the commission's Uniform System of Accounts may be valuable tools, but they cannot dictate ratemaking policies."[22]

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[18] *Id.* at 438 n.22.

[19] *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 239-41 (1936).

[20] *Washington Public Interest Org. v. Public Service Commission of the District of Columbia*, 393 A.2d 71, 80 (D.C. App. 1978); *see also* Kripke, *A Case Study in the Relationship of Law and Accounting: Uniform Accounts 100.5 and 107*, 57 HARV. L. REV. 433, 438 (1944).

[21] *American Telephone & Telegraph Co.*, 64 F.C.C.2d 1, 56-60, 62, 68 (1977); *United Gas Pipe Line Co.*, 31 F.P.C. 1180, 1189 (1964).

[22] *Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n*, 359 F.2d 318, 336 (5th Cir. 1966).

The accounting system prescribed by the FCC has never been viewed as binding on the states for either ratemaking or reporting purposes. State courts and agencies have repeatedly held that the uniform system of accounts is not determinative for ratemaking.[23] The FCC has always shared this view. Thus, when the FCC changed its uniform system in 1978 to permit current earnings on short-term construction work, it stated:

> [W]e are not in any way attempting to influence the intrastate ratemaking decisions the several state commissions may make in this area. Of course, they are free to adopt the same ratemaking treatment for plant under construction and interest during construction as we adopted in Docket 19129, or they may prefer to follow a different treatment.... We do not believe, nor is it intended, that the accounting changes adopted in this proceeding impinge upon the ratemaking prerogatives of any state commission. Further, as everyone is aware, different treatment is already given to a number of items for intrastate vs. interstate ratemaking....[24]

To the extent possible, the state agencies attempt to avoid requiring duplicative records. However, when necessary to permit adherence to their own ratemaking policies,

[23] *E.g., Washington Public Interest Org. v. Public Service Commission of the District of Columbia*, 393 A.2d 71, 81-82 (D.C. App. 1978); *Kansas Power & Light Co. v. State Corporation Commission of Kansas*, 620 P.2d 329, 339 (Kan. Ct. App. 1980); *Re Accounting Treatment for Donations, Dues and Lobbying Expenditures*, 71 PUR 3d 440, 442 (N.Y. Pub. Serv. Comm'n. 1967); *Washington Utilities and Transportation Comm'n v. Pacific Northwest Bell Telephone Co.*, 39 PUR 4th 126, 136 (Wash. Pub. Util. Comm'n. 1980).

[24] *Amend. of Part 31*, 68 F.C.C.2d 902, 906 (1978).

separate intrastate records have been required. FCC regulations recognize and approve this practice.[25]

The FCC and the state commissions also have attempted to achieve uniformity in the depreciation schedules for carriers subject to dual regulation. Three-way meetings, involving the FCC staff, the staff of the state commissions, and representatives of the carrier, have occurred periodically to negotiate the depreciation rates for each state.[26] Agreement normally is reached, but because the rates are negotiated, they nearly always vary from state to state, even for the same company.[27] The FCC has never prescribed uniform rates applicable to all companies or to any given company. When agreements were not reached, the state agencies have used state-prescribed depreciation practices for intrastate ratemaking.[28]

3. Course of proceedings.

The FCC issued two orders in 1980 and 1981 to modify the accounting practices prescribed for carriers. In 1980, the FCC permitted carriers to begin using the "equal life group" and "remaining life" procedures in developing

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[25] 47 C.F.R. §31.01-2(f).

[26] *See Prescription of Revised Percentages of Depreciation*, 88 F.C.C.2d 1223, 1225, 1230-31 (1982).

[27] *Id.* at 1248 *et seq.*

[28] *Pacific Telephone & Telegraph Co. v. Public Utilities Commission of California*, 401 P.2d 353, 372-73 (Cal. 1965); *Southern Bell Telephone & Telegraph Co.*, 66 PUR 3d 1, 57-58 (Fla. Pub. Serv. Comm'n, 1966); *New England Telephone & Telegraph Co.*, 35 PUR 3d 100, 105 (Vt. Pub. Serv. Comm'n, 1960); *New York Telephone Co.*, 20 PUR 3d 129, 143 (N.Y. Pub. Serv. Comm'n, 1957).

depreciation rates rather than the traditional "vintage group" and "whole life" procedures ("*Depreciation Order*").[29] The rule changes were *not* mandatory; carriers were given the option to implement them.[30] The new depreciation practices increased the depreciation expense recorded by carriers. In 1981, the Commission modified the accounting method for station connection costs, requiring the expensing of these costs when incurred rather than the traditional capitalization and amortization of these costs ("*Expensing Order*").[31] Carriers were given an option to select a "flash cut" transition to the new accounting procedure or a gradual phase-in.[32]

After the issuance of the *Expensing Order*, petitions were filed with the FCC seeking a clarification that it was not binding on state agencies for intrastate ratemaking.[33] The FCC responded with a decision that "state commissions are not precluded from using their own accounting and depreciation procedures for intrastate ratemaking purpose...."[34] The FCC concluded that Section 220 of the Communications Act does not require state agencies to adhere to FCC-prescribed accounting and depreciation methods.[35] It also ruled the preemption was not necessary to further any federal policy.[36]

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[29] *Amend. of Part 31*, 83 F.C.C.2d 267 (1980).

[30] *Id.* at 290, 293.

[31] *Amend. of Part 31*, 85 F.C.C.2d 818 (1981).

[32] *Id.* at 842.

[33] *See Amend. of Part 31*, 89 F.C.C.2d 1094 (1982). App. at A-61.

[34] *Id.* at 1095. App. at A-62.

[35] *Id.* at 1107. App. at A-83.

[36] *Id.* at 1108. App. at A-84.

The FCC reversed itself in its *Preemption Decision*.[37] Acting on a petition for reconsideration filed by AT&T and a petition for declaratory order filed by General Telephone Co. of Ohio, the FCC determined that Section 220(b) of the Communications Act,[38] which requires the FCC to prescribe depreciation practices for carriers, preempts state depreciation rates that are inconsistent with those of the FCC.[39] In reaching its decision, the FCC first characterized its *Expensing Order* as a depreciation decision. Although this ruling required the expensing rather than capitalization of station connection costs, the FCC found that "the decision to expense is a determination that there is no category of asset for which depreciation expense will be allowed."[40] It is "therefore clear," said the FCC, that the *Expensing Order* "involves questions of depreciation policy."[41]

Focusing on Section 220(b) rather than on all of Section 220, the FCC determined that preemption was intended by Congress.[42] Alternatively, the FCC determined that it would preempt inconsistent state depreciation practices under its general power to further federal policies.[43] Faster capital recovery was deemed necessary to strengthen the financial health of carriers, permitting them to weather

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[37] 92 F.C.C.2d 864 (1983). App. at A-24.

[38] 47 U.S.C. §220(b). App. at A-133.

[39] *Preemption Decision*, 92 F.C.C.2d at 879. App. at A-49.

[40] *Id.* at 868. App. at A-30 - A-31.

[41] *Id.*, App. at A-31.

[42] *Id.* at 869 *et seq.*, App. at A-31 *et seq.*

[43] *Id.* at 875-78. App. at A-42 - A-48.

emerging "competition" and allowing faster innovation.[44] The *Preemption Decision* voided state ratemaking practices for all intrastate plant, including plant used solely for intrastate communications and the intrastate portion of jointly used plant.

A petition for review of the *Preemption Decision* was filed by the Virginia State Corporation Commission in the United States Court of Appeals for the Fourth Circuit.[45] A number of state regulatory agencies, including the Louisiana Commission, intervened in support of the petitioner. The court of appeals declined to decide whether the language of the Communications Act requires preemption.[46] Instead, in a 2-1 decision, it ruled that the "regulatory action" of the FCC was justified as "within its authority to ensure efficient operation of the interstate telephone network."[47]

The FCC power to preempt, as recognized by the court of appeals, has no discernable limitation. This point was made by the dissenting judge:

> [A]ny ratemaking changes that the carriers want can be adopted, if they can persuade the FCC that they need the money, for any FCC adoption may be imposed on the States by virtue of the Supremacy Clause on the ground that the resultant additional revenue will help the carriers in

[44] *Id.* at 876-77. App. at A-43 - A-46.

[45] *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388 (4th Cir. 1984). App. at A-1.

[46] *Id.* at 392. App. at A-8.

[47] *Id.* at 394. App. at A-11.

> some theoretical way to compete in some market that need not even be specified, as it was not here. The logical result of this decision is to permit the FCC to abrogate completely the state regulation of intrastate ratemaking for the carriers' intrastate operations in violation of the Communications Act.[48]

This view was recently echoed by the United States Court of Appeals for the Fifth Circuit in a proceeding to enforce the *Preemption Decision.*[49]

4. Impact of the *Preemption Decision.*

The *Preemption Decision* had a significant impact on intrastate rates. The Louisiana Commission, for instance, was required in an enforcement proceeding to raise intrastate rates by more than $40 million to comply with the decision.[50] In its most recent rate order involving South Central Bell, the Louisiana Commission determined that the *Preemption Decision* required $62.7 million of the total revenues allowed the company.[51]

The *Preemption Decision* spawned substantial litigation. Armed with a favorable ruling from the FCC,

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[48] *Id.* at 398, App. at A-21 - A-22 (Widener, J., dissenting).

[49] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F.2d 1107, 1123 (5th Cir. 1984). The Fifth Circuit stated: "[T]he Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates.... ' citing the Fourth Circuit dissent.

[50] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983); *aff'd* 744 F.2d 1107 (5th Cir. 1984).

[51] *Ex parte South Central Bell Telephone Co.*, Order No. U-15995-A (La. Pub. Serv. Comm'n, 1984), App. at A-112, A-120.

telephone companies brought numerous federal court injunction suits to compel state regulators to "obey" the edict requiring higher intrastate rates. The state regulatory agencies of Louisiana,[52] Maryland,[53] Iowa,[54] Washington,[55] Arkansas[56] and Kansas[57] have been enjoined by federal courts to change intrastate ratemaking practices to further federal policies. A federal district court in Vermont refused to issue an injunction against the Vermont Public Service Board.[58] An injunction against the Maine Public Utilities Commission was reversed by the United States Court of Appeals for the First Circuit.[59] The Ohio Supreme Court refused to enforce the *Preemption Decision* against the Ohio Public Utilities Commission, ruling it is *ultra vires.*[60]

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[52] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983), *aff'd* 744 F.2d 1107 (5th Cir. 1984).

[53] *Chesapeake & Potomac Telephone Co. of Maryland v. Maryland Public Service Comm'n*, 560 F.Supp. 844 (D. Md. 1983), *appeal pending*, No. 83-1403 (4th Cir.).

[54] *Northwestern Bell Telephone Co. v. Iowa State Commerce Comm'n*, No. 83-688-A (S.D. Iowa 1984).

[55] *Pacific Northwest Bell Telephone Co. v. Washington Utilities and Transportation Comm'n*, 565 F.Supp. 17 (W.D. Wash. 1983), *appeal pending*, No. 83-3746 (9th Cir.).

[56] *Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n*, 738 F.2d 901 (8th Cir. 1984), *cert. pending*, No. 84-483 (U.S.).

[57] *Southwestern Bell Telephone Co. v. State Corporation Commission of Kansas*, No. 83-4090 (D. Kan., 1983).

[58] *New England Telephone & Telegraph Co. v. Public Service Board of Vermont*, 576 F.Supp. 490 (D. Vt. 1983), *appeal pending*, No. 84-7051 (2d Cir.).

[59] *New England Telephone and Telegraph Co. v. Public Utilities Commission of Maine*, 570 F.Supp. 1558 (D. Me. 1983), *rev'd* 742 F.2d 1 (1st Cir. 1984).

[60] *Cincinnati Bell Telephone Co. v. Public Utilities Comm'n of Ohio*, 466 N.E.2d 848 (Ohio 1984), *appeal pending*, No. 84-623 (U.S.).

5. Enforcement proceeding against the Louisiana Commission.

In 1983, the Louisiana Commission issued a rate order in which it did not adopt the FCC-prescribed accounting methods.[61] The Commission determined that the revenues of South Central Bell were sufficient; it did not make a determination of the fair rate of return.[62] South Central Bell brought an enforcement proceeding in federal court pursuant to 47 U.S.C. §401(b) and obtained an injunction requiring the Commission to adopt the FCC procedures.[63] On remand, the Louisiana Commission fully recognized more than $40 million in added expenses resulting from the FCC methods in computing the intrastate revenue requirement of the company, but also examined the rate of return issue in light of the apparent need for a rate increase. The Commission found that a rate of return on equity of 12 percent, an amount lower than that implicit in its previous Order, was sufficient.[64] A rate increase of $12,700,000 was allowed.[65]

Further enforcement proceedings were brought by South Central Bell. The federal district court this time enjoined the Louisiana Commission from altering the company's allowed rate of return, and required an intrastate

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[61] *Ex parte South Central Bell Telephone Co.*, Order No. U-15445 (La. Pub. Serv. Comm'n, 1983), App. at A-94.

[62] *Id.*, App. at A-95.

[63] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983).

[64] *Ex parte South Central Bell Telephone Co.*, Order No. U-15445-A (La. Pub. Serv. Comm'n, 1983), App. at A-97 - A-100.

[65] *Id.*, App. at A-101.

rate increase of more than $40 million.[66] This ruling was upheld by the United States Court of Appeals for the Fifth Circuit.[67] The Fifth Circuit deemed itself powerless to determine the validity of the *Preemption Decision*, but interpreted the ruling as precluding state agencies from making intrastate rate determinations that would frustrate the purpose of the FCC.[68] Thus, the dollar-specific injunction was affirmed, although the Fifth Circuit noted that the "Preemption Order comes perilously close to undermining completely state authority and discretion to set intrastate rates...."[69] The Louisiana Commission has appealed the enforcement decision.

THE QUESTION IS SUBSTANTIAL

The decision of the court of appeals approves the conscription of state regulatory officials by the FCC to raise intrastate telephone rates. It therefore embodies a dramatic clash between federal and state sovereign and regulatory interests. The ruling affects nearly every state ratemaking agency and most telephone consumers. It mandates large intrastate rate increases that will impede the ability of poor consumers to obtain telephone service.

The decision is contrary to the scheme of regulation contemplated in the Communications Act because it allows the FCC to prescribe intrastate telephone rates. The ruling

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[66] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 570 F.Supp. 227 (M.D. La. 1983).

[67] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984).

[68] *Id.* at 1123.

[69] *Id.*

endorses unlimited intrastate ratemaking power of the FCC, because the preemption of any ratemaking decision to increase the revenue of telephone companies would have a conceivable relationship to the federal goal of encouraging innovation. The Communications Act expressly forbids the FCC from asserting control over intrastate rates. Therefore, the decision of the court of appeals approves a regulatory action that was forbidden by Congress.

The ruling of the court of appeals conflicts with a recent ruling of the Supreme Court of Ohio, which is already on appeal to this Court.[70] It also conflicts with four decades of state judicial and administrative rulings that the Supremacy Clause does not preclude state agencies from using their own accounting procedures for intrastate ratemaking.

The question is substantial. This Court should grant plenary review to consider whether the FCC may mandate intrastate rate increases in conflict with the Congressional directive.

A. *The Decision of the Court of Appeals Approves Unlimited Power in the FCC to Preempt Intrastate Ratemaking Practices, Contrary to the Express Limitations of the Communications Act.*

The ruling of the court of appeals approves the "affirmative regulatory action"[71] of the FCC to preempt

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[70] *Cincinnati Bell Telephone Co. v. Public Utilities of Ohio*, 466 N.E.2d 848 (Ohio 1984), *appeal pending*, No. 84-623 (U.S.).

[71] *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388, 392 (4th Cir. 1984), App. at A-1 - A-8.

intrastate ratemaking practices in light of the "overriding"[72] federal objective of achieving a " 'rapid, efficient, Nationwide, and world-wide' "[73] communications service. In effect, the court of appeals recognizes plenary authority in the FCC to make any of its own practices binding on the state commissions, because any procedure that increases revenues conceivably would promote the goal of innovation. The decision is contrary to the Communications Act.

The *Preemption Decision* rested on two grounds. First, the FCC contended that Section 220(b) of the Communications Act,[74] which authorizes the FCC to prescribe depreciation practices for carriers, automatically preempted state practices that were inconsistent with the *Expensing Order* and the *Depreciation Order*.[75] Second, the FCC ruled that even if Section 220(b) did not require preemption, the FCC would exercise its general preemptive power "to preempt state actions that interfere with the accomplishment of federal policies and objectives."[76]

The court of appeals did not decide whether Section 220(b) requires preemption, apparently realizing that 50 years of practice and precedent might be too much to overcome.[77] Instead, the court of appeals held that the

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[72] *Id.*

[73] *Id.*

[74] 47 U.S.C. §220(b), App. at A-133.

[75] *Preemption Decision*, 92 F.C.C.2d 864, 879 (1983), App. at A-24, A-49.

[76] *Id.* at 880, App. at A-50.

[77] *See Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388, 392 (4th Cir. 1984), App. at A-1, A-8.

"affirmative regulatory action taken by the FCC suffices to preempt inconsistent state action...."[78] The court of appeals reasoned that the FCC has statutory authority to prescribe depreciation rates.[79] When inconsistent state practices may impede the accomplishment of a federal goal, it ruled, the FCC may require the adoption of the federal formula by the state agencies.[80]

There is no limit to the reach of this decision. The FCC has statutory authority to make *all* interstate ratemaking determinations respecting carriers. Any inconsistent state ratemaking practice that reduced the financial health of carriers could be viewed as impeding innovation, just as the practices preempted in this case assertedly impede innovation. The FCC could decide that carriers are entitled to collect all expenses recorded on their books pursuant to cost-of-service tariffs, without regulatory review; that they are entitled to current earnings on all construction work; that they should be allowed accelerated depreciation; or that they require a minimum rate of return. Pursuant to the ruling of the court of appeals, the FCC could preempt inconsistent state practices, fully conscripting state officials to raise rates in fulfillment of the FCC policy. Indeed, the Fifth Circuit already has interpreted the *Preemption Decision* as precluding the adjustment of the rate of return in a manner that might frustrate the *Preemption Decision*.[81]

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[78] *Id.*

[79] *Id.* at 394, App. at A-11.

[80] *Id.*

[81] *South Central Bell Telephone Co. v. Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984).

In *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*,[82] this Court held that a federal agency does not require an express Congressional authorization to preempt state law.[83] However, the Court determined that the preemptive action must be within the agency's delegated authority and must not run counter to Congressional intent.[84] Thus, a preemptive decision should be overruled when " 'it appears from the statute or its legislative history that the [preemption] is not one that Congress would have sanctioned' "[85] or when it is " 'inconsistent with' "[86] the underlying statute.

The decision of the court of appeals is contrary to the Communications Act, which forbids the FCC from attempting to set intrastate rates. Section 2(b) of the Act provides:

> [Except for a separate provision relating to pole attachments and subject to a separate provision relating to radio], nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier....[87]

This statute preserves the authority of state agencies over intrastate charges and intrastate ratemaking practices. In addition, Congress precluded the FCC from regulating

[82] 458 U.S. 141 (1982).

[83] *Id.* at 154.

[84] *Id.*

[85] *Id.*, quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961).

[86] *Id.*, quoting *Free v. Bland*, 369 U.S. 663, 668 (1962).

[87] 47 U.S.C. §152(b), App. at A-132.

communication already regulated by the states, even when the communication crossed state lines. Section 3(e), which defines "[i]nterstate communication" and "interstate transmission," and therefore determines the reach of FCC power,[88] states that these terms "shall not...include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission."[89] Section 221(b) also reserves jurisdiction to the states over exchange service "subject to regulation by a State commission or by local governmental authority,"[90] even when "a portion of such exchange service constitutes interstate or foreign communication."[91]

The legislative history of the Communications Act also shows that Congress intended to prohibit intrastate rate setting by the FCC. Congress intended to prohibit the FCC from exercising power over intrastate rates in the fashion this power was used by the Interstate Commerce Commission ("ICC") in the *Shreveport Rate Case*,[92] where intrastate rates were raised to the level prescribed by the ICC to avoid discrimination. As the Fourth Circuit recognized in a previous case, *North Carolina Utilities Comm'n v. Federal Communications Comm'n*,[93] "Congress sought to deny the FCC the kind of jurisdiction

[88] *See* 47 U.S.C. §151, 152(a), App. at A-131.

[89] 47 U.S.C. §153(e), App. at A-132.

[90] 47 U.S.C. §221(b), App. at A-136.

[91] *Id.*

[92] *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914).

[93] 552 F.2d 1036 (4th Cir. 1977).

over local rates approved by the *Shreveport Rate Case*."[94] Therefore, the express reservation of power to the states prevents the FCC from preempting ratemaking decisions.

The decision of the court of appeals is also contrary to Section 410 of the Communications Act, in which Congress expressly contemplated that state commissions would maintain separate records from those of the FCC for ratemaking. Section 410(b) provides:

> (b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission;... The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.[95]

By permitting the FCC to require that state agencies conform their practices to those of the FCC, the court of appeals frustrates the Congressional plan for a dual regulatory system.

In previous cases decided by courts of appeals in which preemption was permitted, the state and federal policies were irreconcilable. A decision to deregulate terminal equipment, for instance, requires uniformity, because a single telephone set cannot be divided into its

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[94] *Id.* at 1047.

[95] 47 U.S.C. §410(b). App. at A-138.

intrastate and interstate components.[96] For ratemaking, however, the separations process mandated by this Court[97] and Congress[98] does allow the division of the intrastate and interstate components. The state commissions set intrastate rates to cover the expenses and pay a rate of return on the investment allocated to the intrastate jurisdictions; the FCC sets rates for interstate plant and investment. There is no reason why the Congressional demarcation line must fall.

The FCC has the authority under the Communications Act to make the jurisdictional separation of the property and expenses of carriers, after receiving recommendations from a federal-state joint board. The separation procedure must comply with the principles announced by this court in *Smith v. Illinois Bell Telephone Co.*[99] Once it makes the assignment of property to the intrastate jurisdictions, the FCC may not overrule state ratemaking practices on the ground that they inhibit federal policies. In this case, of course, the FCC overruled state ratemaking practices for all plant, including that which is used solely for intrastate communication, exacerbating the intrusion into the intrastate realm.

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[96] *See Computer and Communications Industry Ass'n v. Federal Communications Comm'n*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom Louisiana Public Service Comm'n v. Federal Communications Comm'n*, __ U.S. __, 103 S.Ct. 2109 (1983).

[97] *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).

[98] 47 U.S.C. §221(c), 410(c), App. at A-137, A-138.

[99] 282 U.S. 133 (1930). *See also* Federal-State Communications Joint Board Act, 1971 U.S. Code & Ad. News 1511 at 1512: "[T]he allocations of costs must be reasonable, i.e., must have appropriate correlation to the different uses of the commonly used plant."

The *Preemption Decision* is especially egregious because it delegates to carriers the right to preempt the ratemaking practices of their state regulatory agencies. By giving carriers the option of adopting faster depreciation methods in the *Depreciation Order*, then preempting inconsistent state rules, the FCC allowed the carriers to decide whether state depreciation practices are displaced. This assignment of preemptive power to regulated parties is an ironic revision of the Communications Act.

The uniform systems of accounts prescribed by federal agencies have not even bound these agencies for their own ratemaking.[100] As the Fifth Circuit said in *Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n*, these systems are "valuable tools, but they cannot dictate ratemaking policies."[101] The use of statutory authority permitting the FCC to require uniform *reporting*, to instead dictate intrastate *ratemaking*, is a perverse reinterpretation of Congressional intent.[102]

The decision of the court of appeals eviscerates provisions of the Communications Act reserving jurisdiction to the states and approves the conscription of state officials to further a policy of the FCC. The ruling presents a substantial issue requiring plenary review by the Court.

B. *The Decision of the Court of Appeals Conflicts With State Judicial and Administrative Determinations.*

The ruling of the court of appeals conflicts with

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[100] *American Telephone & Telegraph Co.*, 64 F.C.C.2d 1, 56-60, 62, 68 (1977); *United Gas Pipe Line Co.*, 31 F.P.C. 1180, 1189 (1964).

[101] 359 F.2d 318 (5th Cir. 1966).

[102] *Id.* at 336.

virtually every decision since the passage of the Communications Act concerning the discretion of state agencies to rely on their own ratemaking practices. The decision to upset this body of law raises a substantial issue that should receive plenary review from this Court.

Recently, the Supreme Court of Ohio flatly held that the *Preemption Decision* is *ultra vires*.[103] This decision of the highest court of a state conflicts with the ruling of the court of appeals, justifying plenary review.[104] In addition, a number of state courts have held that state regulatory agencies are free to determine their own accounting practices for intrastate ratemaking.[105] Moreover, numerous decisions of state regulatory agencies hold that FCC accounting procedures are not binding for intrastate ratemaking.[106] Furthermore, the FCC itself has ruled that

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[103] *Cincinnati Bell Telephone Co. v. Public Utilities Commission of Ohio*, 466 N.E.2d 848, 853 (Ohio 1984), *appeal pending*, No. 84-623 (U.S.).

[104] *Cf.* S.Ct. R. 17.1(a).

[105] *Pacific Telephone & Telegraph Co. v. Public Utilities Commission of California*, 401 P.2d 353, 372-73 (Cal. 1965); *Northwestern Bell Telephone Co.*, 43 N.W.2d 553, 557 (S.D. 1950); *Washington Public Interest Org. v. Public Service Commission of the District of Columbia*, 393 A.2d 71, 79-85 (D.C. App. 1978); *Kansas Power & Light Co. v. State Corporation Comm'n of Kansas*, 620 P.2d 329, 339 (Kan. App. 1981).

[106] *E.g.*, *Southwestern Bell Telephone Co.*, 42 PUR 4th 89, 99 (Kan. St. Corp. Comm'n, 1981); *Washington Utilities and Transportation Comm'n v. Pacific Northwest Bell Telephone Co.*, 39 PUR 4th 126, 135-36 (Wash. Util. & Transp. Comm'n, 1980); *Southwestern Bell Telephone Co.*, 36 PUR 4th 283, 294 (Mo. Pub. Serv. Comm'n, 1980); *Re Accounting Treatment for Donations, Dues, and Lobbying Expenses*, 71 PUR 3d 440, 442 (N.Y. Pub. Serv. Comm'n, 1967); *Southern Bell Telephone & Telegraph Co.*, 66 PUR 3d 1, 58 (Fla. Pub. Serv. Comm'n, 1966); *New England Telephone & Telegraph Co.*, 35 PUR 3d 100, 104 (Vt. Pub. Serv. Comm'n, 1960).

its accounting procedures are not binding on the states.[107] The ruling of the court of appeals presents a substantial issue because it upsets this body of law.

In the *Preemption Decision*, the FCC overruled its own prior decision, its own administrative determinations, and more than four decades of practice. The decision was affirmed by a bare one-judge majority.[108] Given the conflict between the ruling of the court of appeals and the uniform decisions of state judges and administrators, and the important federalism issue it raises, the holding justifies plenary review by this Court.

CONCLUSION

The conscription of state regulatory officials to further a federal policy by increasing intrastate telephone rates is unjustified. The decision of the court of appeals defies the express reservation of intrastate jurisdiction in the Communications Act, cuts deeply into the sovereignty of the states, and overturns more than four decades of regulatory precedent and practice. The preemption of state ratemaking practices is unnecessary because interstate and intrastate ratemaking functions are separable, and indeed have been separated for decades. Therefore, the Court should grant plenary consideration of the appeal. Alternatively, if the Court determines that this appeal was improvidently taken, the Louisiana Commission requests the Court to treat these

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[107] *Amend of Part 31*, 68 F.C.C.2d 902, 906-07 (1978); 47 C.F.R. §31.01-2(f).

[108] *Virginia State Corporation Comm'n v. Federal Communications Comm'n*, 737 F.2d 388 (4th Cir. 1984); App. at A-1 (Widener, J., dissenting).

papers as a petition for a writ of certiorari, and to grant the writ.

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